Supreme Court, U.S.
FILED
JAN 15 2002
CLERK

No. 01-948

IN THE
SUPREME COURT OF THE UNITED STATES

DAVE DORMIRE,
Superintendent,
Jefferson City Correctional Center

Petitioner,

vs.

JAMES KOSTE,

Respondent.

On Petition for Writ of Certiorari to the United States of Appeals for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL J. SPILLANE
Assistant Attorney General
Missouri Bar No. 40704
Counsel of Record
Post Office Box 899
Jefferson City, MO6 65102-0899
(573) 751-3321
Counsel for Petitioner

6rp

REASONS FOR GRANTING THE WRIT

I. **The decision of the Court below that a conviction must be automatically reversed without any showing of prejudice in a case in which a criminal defendant has alleged a conflict based on his own accusations that counsel was ineffective in an earlier case is contrary to the decisions of this Court and other circuit courts of appeals.**

II. **The decision of the court below interpreting the "contrary to" language of 28 U.S.C. §2254(d)(1) is in compatible with the decision of this Court in *Williams v. Taylor*, 529 U.S. 362 (2001) after similar confusion and threatens to sow the confusion concerning the standard of review to be used in habeas cases that was eliminated by this Court in the *Williams v. Taylor* decision.**

Respondent essentially makes three arguments against granting certiorari in this case. These are the following:

1) *Wood v. Georgia*, 450 U.S. 1 (1981) was a case in which this Court applied *Holloway v. Arkansas*, 435 U.S. 75 (1978) and *Cuyler v. Sullivan*, 446 U.S. 335 (1980) in a context other than joint representation. Therefore it was permissible for the court below to grant a writ of habeas corpus requiring automatic reversal of a conviction without prejudice analysis in a case of an alleged personal conflict between an attorney and client.

2) The cases cited by Petitioner to show a conflict between the circuits, involved holdings that the decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980) concerning conflicts of interest does not apply to cases of a personal conflict between an attorney and client. These cases therefore do not stand for the proposition that the *Holloway* automatic reversal

rule does not apply to such cases.

3) Even if a conflict between the Circuit Courts of Appeals does exist, this is not the proper case to resolve it because Respondent alleges his guilty plea should be overturned for reasons not relied on by the court below.

None of these arguments are persuasive. The arguments do not negate the conflict between the circuits or demonstrate that this is not the appropriate case to resolve the conflict.

1. *Wood v. Georgia*, 450 U.S. 1 (1981) was a case in which the operators of an allegedly criminal enterprise, who were never identified, provided legal representation in a criminal case for their low level employees. This representation in practice produced a strategy that benefited the employers by creating a constitutional test case, rather than attempting to keep the nominal clients out of jail. This Court in *Wood* did not automatically reverse the convictions of the defendants or even reverse the revocations of their probations but rather remanded the case for analysis by a trial court on the issue of whether an actual conflict existed, even though the trial court had known that counsel had been provided by the employer and pressed a constitutional attack rather than arguing for leniency.

Further, *Wood* is much closer to a multiple representation case than to a case involving a personal conflict with counsel. The attorneys in *Wood* did in fact arguably represent the employer and the criminal defendants, although the employer was never identified and therefore never charged. *Wood* does not create clearly established federal law that supported granting a writ of habeas corpus requiring automatic reversal in this case based on the "contrary to" clause of 28 U.S.C. §2254(d)(1).

2. Respondent's argument that the cases cited by Petitioner do not point out a conflict is not logical. *Holloway v. Arkansas*, 435 U.S. 75 (1978) sets out a rule for when an alleged conflict of interest, of the type discussed in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), is not investigated by the trial court even though it is brought to the court's attention prior to trial. The holdings of several circuit courts of appeals that *Strickland v. Washington*, 466 U.S. 668 (1984) not *Cuyler v. Arkansas* applies to the type of personal disputes between counsel and client that are the subject of this case also means that *Holloway* does not apply. *Holloway* cases are simply a subset of *Cuyler* cases in which an independent investigation of a known allegation of a conflict was not made prior to trial. If there is no *Cuyler* conflict there is necessarily no way to apply *Holloway* to the fact pattern. Therefore the decision of the court below that it was contrary to *Holloway* to require a showing of prejudice in a case in which a personal conflict with counsel was alleged, but not investigated prior to a plea, does conflict with the cases from other circuit courts of appeals holding *Strickland* not *Cuyler* must be used in analyzing claims of personal conflict. The decision in this case is in conflict with the cases cited in the certiorari petition (Certiorari Petition at 9).

3. Respondent argues that he believes his guilty plea colloquy was deficient and therefore this is not the proper case to resolve a conflict between the circuit courts of appeals on whether automatic reversal is required by failure of a guilty plea court to investigate an alleged personal conflict between an attorney and a criminal defendant. The matters Respondent complains about were not the basis of the decision of the court below nor would these issues be relevant to merits review by this Court on the issues on which the United States Court of Appeals for the Eighth Circuit granted relief. A habeas petitioner as a practical matter can always allege additional error occurred on which relief was not

granted. This contention is not material to the fact that the issue that was decided by the court below creates a conflict between the circuit courts of appeals which can be decisively resolved on the facts of this case.

Conclusion

The petition for certiorari should be granted.

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

MICHAEL J. SPILLANE
Assistant Attorney General
Counsel of Record
Post Office Box 899
Jefferson City, Mo 65102
(573) 751-3321
Counsel for Petitioner